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No. 90-1149

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Petitioner,

v.

MACK TRUCKS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant who moves successfully to dismiss the complaint at the close of the plaintiff's case has waived his right to present a defense in the event an appellate court later reverses the dismissal and remands the case for completion of the trial.

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OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit are identified in and appended to the Petition for a Writ of Certiorari and will not be reprinted here.

COUNTERSTATEMENT OF THE CASE

This is an action brought in December 1985 by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") pursuant to Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, to enjoin

preliminarily and permanently the decision of Respondent Mack Trucks, Inc.[1] ("Mack" or "the Company") to change health care benefit carriers from the Blue Cross/Blue Shield organization to the Equitable Life Assurance Society of the United States. The UAW contended that the collective bargaining agreement in effect between the UAW and Mack prohibited a change of carrier without the consent of the UAW.[2]

After discussion between the parties, the UAW withdrew its request for preliminary injunction, and the carrier change became effective on January 1, 1986. The UAW continued to press for a permanent injunction rolling back the change, and the case went to trial in the district court in August 1986.

The UAW contended at trial that the collective bargaining agreement prohibited Mack from changing health care benefit carriers without the approval of the UAW. At the close of the plaintiff's case, Mack moved for a directed verdict pursuant to Rule 50, Fed. R. Civ. P.,[3] arguing (a) that the Union had failed to prove any damage to its members, and thus had not made out a

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[1] Mack Trucks, Inc. is a wholly-owned subsidiary of Renault Vehicules Industriels, S.A. Mack has no subsidiaries that are not wholly-owned.

[2] Mack and the UAW were parties to a Master Collective Bargaining Agreement covering the period from October 30, 1984 to October 20, 1987. A successor agreement, containing the same language that is in dispute here, remains in effect at present.

[3] *See* the second opinion of the court of appeals, *UAW v. Mack*, Petitioner's Appendix p. 5a, n.2, which states:

> Although the district court and the parties referred to Mack's motion as a Rule 50 motion, the trial was non-jury, and the proper motion would have been under Rule 41(b). Rule 50 applies to jury trials; Rule 41(b) applies to non-jury trials. *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474 (3d Cir. 1979). But this is of no consequence. When either motion is denied or reversed on appeal, the process is the same—the trial continues.

right to relief even if Mack had violated the agreement; and (b) that on the evidence presented in the plaintiff's case, the UAW had not proved a breach of contract.

The district court heard argument on the motion for directed verdict, and granted the motion, entering judgment in Mack's favor without hearing any of Mack's evidence. The court held that the UAW had proved a breach of contract, but that its failure to establish actual harm to UAW members was fatal to its case.

The UAW appealed the decision of the district court, and on June 5, 1987, the United States Court of Appeals for the Third Circuit reversed the district court, holding that:

> The Union came forward with proof that Mack's decision to change unilaterally the health insurance carrier violated the collective bargaining agreement and caused the Union substantial harm by depriving it of a bargaining chip which the Union might trade for other Mack benefits.

820 F.2d at 98.

Although the court held that the UAW had established that the company's action had caused "substantial harm" that required a remedy, the court remanded the case to the district court because Mack had not yet had the opportunity to present a defense. The Court stated:

> However, we will not (as the UAW requests) order the district court presently to grant [a permanent injunction], since the directed verdict precluded Mack from introducing evidence to counter the Union's case. Accordingly, we will remand this case for further proceedings.

Id.

On remand, Mack maintained its defense that it had not violated the contract, and fortified that defense with new exhibits and a new argument. The UAW attempted to bar Mack from contending it had not violated the con-

tract. In an Order dated July 14, 1989, the court allowed Mack to prove that it had not violated the contract. The trial resumed on October 4, 1989, with the presentation of Mack's defense. Mack presented evidence that the language of the collective bargaining agreement permitted the Company to change health benefits insurance carriers, provided that the Company did not change from a traditional fee-for-service health benefits program to an "alternate delivery system" such as a health maintenance organization or a preferred provider organization.

The district court accepted Mack's argument that the collective bargaining agreement had not been violated by the carrier change, and entered judgment in favor of the Company on February 12, 1990. The UAW appealed, and the United States Court of Appeals for the Third Circuit affirmed in a decision filed October 18, 1990.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT RAISE AN ISSUE AS TO THE PROPER INTERPRETATION OF THE COMMON LAW DOCTRINE OF LAW OF THE CASE.

The doctrine of law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *Messinger v. Anderson*, 225 U.S. 436, 444 (1912). The doctrine has been held to apply not only to issues expressly litigated by the parties and decided by a court, but also to issues decided by "necessary implication," *Fogel v. Chestnutt*, 668 F.2d 100, 108 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982), and to issues decided by a trial court that could have been, but were not, raised on appeal. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-93 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985).

A central premise of the doctrine of law of the case—like its sibling doctrines *res judicata* and collateral estoppel—is that the party against whom the doctrine is invoked must have had a full and fair opportunity to litigate the issue on which his opponent now claims finality. Actual litigation of the issue need not have occurred, provided both parties are afforded an opportunity to have the question decided. *Montana v. United States*, 440 U.S. 147, 153-154 (1979). In no case cited by the petitioner has either a district court or an appellate court invoked the doctrine of law of the case against a party who did not enjoy the opportunity to present evidence.

The UAW asked the lower courts to invoke law of the case to bar Mack from contending at the resumption of the trial that it had not violated the Mack-UAW collective bargaining agreement. The UAW argues that the first court of appeals decision in this case settled that issue forever, and that Mack's failure to contest the breach of contract issue on the first appeal bars it from litigating that question now.

As the Court of Appeals for the Third Circuit pointed out, this contention by the UAW disregards the procedural posture of the first appeal. As noted above, Mack won the case in 1986 without presenting any evidence. At the close of the plaintiff's case, the district court held —erroneously, according to the court of appeals—that proof of a violation of the contract was not sufficient to justify relief in the absence of any resultant harm to the UAW members. Because Mack was successful at this point, it could not possibly have appealed from the directed verdict granted by the district court. *Electrical Fittings Corp. v. Thomas & Betts Company*, 307 U.S. 241, 242 (1939); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333 (1980). Accordingly, Mack had no opportunity either to litigate the contract violation issue in the district court, or to raise the issue squarely on appeal. Because Mack's success in moving for judg-

ment at the end of the plaintiff's case in 1986 precluded Mack from putting on its defense, law of the case does not apply, and the subsequent reversal by the court of appeals does not have preclusive effect on whether a violation of the contract had occurred.

The UAW states correctly that when the trial commenced in October 1989, Mack advanced before the district court an argument that had not been an explicit part of its case at the beginning of the trial in 1986. The Union's appeal and its petition before this Court amount to an argument that the district court should not have allowed the Company to add a new legal argument prior to the 1989 trial. Indeed, the UAW raised this argument before the district court prior to trial, and raised it again before the court of appeals. Control of the presentation of witnesses and exhibits before the district court is a matter entrusted to the sound discretion of the district court. Fed. R. Civ. P. 16. It is neither unusual nor alarming for a district court to allow the parties to add witnesses and exhibits, or to modify arguments set forth in their pretrial memoranda at any time up to and including the trial itself.[4] *Ely v. Reading Co.*, 424 F.2d 758, 763-764 (3d. Cir. 1970). The court of appeals in this case found no error in the trial court's handling of the matter. In any event, whether the district court properly permitted Mack to add a new argument is certainly not a matter that this Court need decide on a writ of certiorari.

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[4] Mack announced its intention of adding to the exhibit list more than three months before trial. The district court issued an Order approving the change on July 14, 1989. *See supra* p. 3.

II. THE DECISION BY THE COURT OF APPEALS ON THE ISSUE OF LAW OF THE CASE DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURTS OF APPEALS.

The court of appeals held that the law of the case doctrine did not apply to this case because of the procedural posture in which it was first received by the court of appeals. Specifically, the court of appeals held that because Mack's success on its motion at the close of the plaintiff's case had precluded it from putting on any evidence, the decision of the district court in the original trial—and thus necessarily its own decision on the first appeal—were not the law of the case. This decision does not conflict with case law in any other circuit. In every case cited in the petition as conflicting with the decision of the Third Circuit, the doctrine of law of the case was invoked only after all parties had been afforded a full and fair opportunity to litigate the issue before the district court. All these decisions are consistent with the decision of the Third Circuit in the instant case.

The petition cites the following cases, each of which stands for the proposition that a party who has been afforded the opportunity before the district court to contest an issue, but who abandons that issue in a first appeal, is precluded from seeking reversal of that issue in a second appeal. *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982) (court refused to consider a new contention that could have been raised but was not raised in a prior appeal); *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982) (court refused to consider an issue defendant had chosen not to argue in a prior appeal, though it had been afforded the opportunity); *cert. denied*, 459 U.S. 828 (1982); *Northwestern Indiana Telephone Co., Inc. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 757 (1990) (court refused to consider issue that through

inadvertence, not lack of opportunity, party had failed to raise in prior appeal); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) (court refused to hear argument on an issue not challenged on the first appeal when appellant had been afforded the opportunity, and had, in fact, attacked other portions of the award).

In both *Laffey v. Northeast Airlines*, 740 F.2d 1071 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985) and *Little Earth of the United Tribes v. HUD*, 807 F.2d 1433 (8th Cir. 1986) the district courts had entered orders on fully litigated issues that the defendants did not challenge in their initial appeal. In each case, the court invoked law of the case in a second appeal to bar the defendant from challenging the order on the second appeal. In the instant matter, the court below properly declined to invoke the law of the case doctrine because the 1986 Order that was appealed from was adverse to the UAW, not Mack. Thus, the *Laffey* and *Little Earth* decisions do not conflict with the decision of the Third Circuit.

Similarly, this Court's decision in *Arizona v. California*, 460 U.S. 605 (1983), does not conflict with the decision of the court below. In that case, the United States and certain Indian tribes sought to reopen a twenty-year old water rights decree to evaluate areas allegedly not covered by the prior decree. The Court invoked the law of the case doctrine, upholding the prior decree, and reasoning that the factual and legal issues had been fully and fairly litigated in the prior proceeding in the same case.

In no case has this Court or any court of appeals accorded finality to a finding of fact or conclusion of law entered by a court at the close of the plaintiff's case. Therefore, this matter does not present a conflict in the law of the circuit courts of appeals.

CONCLUSION

Because the court of appeals decided correctly that the procedural posture of the case precluded application of the doctrine of law of the case, and because this decision was in accord with the decisions of other courts of appeals on this procedural point, Mack requests that this Court not grant a writ of certiorari.

Respectfully submitted,

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